United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7171

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SEA-LAND SERVICE, INC., *et al.*,

Plaintiffs-Appellants,

—against—

AETNA INSURANCE COMPANY, *et al.*,

Defendants-Appellees.

ON APPEAL BY SEA-LAND SERVICE, INC. FROM A DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES AETNA INSURANCE COMPANY, ET AL.

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Statement of the Case

This is an action by Sea-Land Service, Inc. (hereinafter Sea-Land) and its hull insurers to recover general average contributions alleged to be due of defendants (hereinafter Cargo) as the result of the stranding of the SS REAU-REGARD. The amount demanded of defendants was $464,979.04. (6a-13a; 71a-72a).

On May 21, 1972, the plaintiffs filed their complaint and the several defendants filed answers on May 5, 1972 and

June 26, 1972. (1a). The trial took place on July 15, 16 and 17, 1975 before the Honorable Whitman J. Knapp. (4a).

On February 10, 1976 the Court's Opinion, No. 43863 was filed (84a-90a), and on May 19, 1976 Consent Judgment No. 76240 was entered in favor of plaintiffs awarding them the sum of $54,231.17, plus interest as set forth therein. (92a-93a).

On March 30, 1976, plaintiffs filed their Notice of Appeal. (97a).

Issue Presented for Review by Appellant

Was the damage suffered by the SS BEAUREGARD during salvage operations after a towline parted a general average sacrifice? (Brief for Appellant at 2).

Statement of Facts

On May 5, 1967 at 1813 hours, the SS BEAUREGARD grounded at the west breakwater at the entrance to the Port of Rio Haina, Dominican Republic. (48a, par. 4).

Captain Boehm, the Master of the SS BEAUREGARD, had experienced considerable difficulty in approaching the entrance to Rio Haina because of adverse weather and sea conditions. (89a, par. 13). In all, he made three approaches. (90a, pars. 14, 15, 16). The first approach was aborted because of the weather and poor visibility. (88a, par. 2; 90a, par. 14). He then attempted a second approach into the harbor, but this time with Rio Haina Pilot Torres aboard. He was again forced to abort because of prevailing weather conditions. (90a, par. 15). After the second unsuccessful attempt to enter the harbor, Pilot Torres was contacted on the radio-telephone by Mr. Collie, Manager

for Sea-Land's Dominican operations. (90a, par. 16).[1] Collie told Torres that the visibility had improved, and that therefore, Torres should bring the ship in. (90a, par. 17). The third and final approach was underway when the BEAUREGARD was struck by winds and currents and by sudden rain squalls which obscured visibility, just as she approached the harbor entrance. (90a, par. 16; 88a, par. 4). The natural force of the winds and currents caused the BEAUREGARD to ground at the west breakwater. (88a, par. 4). The grounding was in no way caused by the negligence of Captain Boehm or Pilot Torres. (88a, par. 4).

At 1813 hours, the vessel was at Position A, with her port bow up against a wrecked tanker. (E-2; E-38; E-39; 90a, par. 33).[2] The BEAUREGARD was six feet onto the rocks on the port side only, and that thus 462 feet of her total overall length of 468 feet 8½ inches was free and subject to the effect of the prevailing weather and sea conditions. (*infra* at 10).[3] The wind, the swell, the waves, the current—all were from the East Northeast (ENE). (*infra* at 10). The Captain decided to take immediate action to attempt to free the vessel. (89a, par. 8). He ordered full astern in an effort to release the vessel using its own engine power. (90a, par. 35). In response to the full astern

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[1] Sea-Land offered the testimony of one Manuel Feliz for the sole purpose of refuting Pilot Torres' testimony that Collie contacted him on the radio-telephone, but the Lower Court's finding repudiates Feliz' testimony. (90a, par. 16).

[2] Position A: Vessel's bow was pointing 357° True, bow was about 15 feet from and 20 feet inshore of west breakwater. (E-8).

[3] At numerous points in its brief, Sea-Land baldly asserts that the BEAUREGARD was firmly held by the breakwater while in Position A or was in the firm grip of the breakwater. (Brief for Appellant at 2, 8, 28). There is no evidence for this assertion. Cargo finds it difficult to conceive how the BEAUREGARD could be described in the "grip" of the breakwater when she was grounded only up to 6 feet on her port bow.

engines, the BEAUREGARD moved a little bit. (424a, l. 15-425a, l. 2). After numerous signals were sent requesting assistance, the tug RP 12, under the command of Captain Rojo, arrived on the scene within ten minutes of the grounding. (90a, par. 34).[4] The RP 12 was directed to the vessel's starboard quarter, and a manila hawser was attached to the ship and to the tug. (90a, par. 36). The tug pulled on the towline for ten minutes while the ship's engines were full astern. (90a, par. 36). At 1833, the towline broke. (E-8).[5] At 1842, the RP 12 was directed to the port quarter and ordered to push the stern towards the east. These efforts proved unsuccessful. By 2208, over 3½ hours after the stranding at Position A, the stern of the BEAUREGARD had been pushed sideways by the weather and current to Position B. (E-2; E-8; E-38; E-39; 89a, par. 13).[6]

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[4] During the course of pre-trial depositions Sea-Land's counsel produced a written statement purportedly given by Rojo at the request of Mr. Collie which placed Rojo in Santo Domingo some 17 steaming hours away, but in post-trial argument plaintiffs acknowledged that Rojo did in fact attend the BEAUREGARD within minutes after stranding. (E-76). Cargo speculates that the only reason for Mr. Collie to obtain the statement was to eliminate a potential fact witness whose testimony might be unfavorable to Sea-Land.

[5] Sea-Land contends that the movement astern weakened the grip on the BEAUREGARD's bow. (Brief for Appellant at 6). This is not supported in the record. All Captain Boehm said was that she had moved and that the vessel started coming free. (339a-340a; 353a). Sea-Land further asserts that the tow operation "left the vessel in a worse position than before the tow was attempted." (Brief for Appellant at 10). Nothing in the record supports this statement. Not less than three times does Sea-Land argue that after the towline had parted the BEAUREGARD had moved far enough aft so that the breakwater's grip on the bow had been loosened just enough to permit the bow to pivot and the stern to swing to port, but not enough to allow her to float free. This imaginative hypothetical is most interesting, however, again it must be stated that there is nothing in the record to support it.

[6] Position B: Vessel's bow was pointing 015° True. Bow was approximately 175 feet inshore of end of west breakwater. (E-8;

The vessel sustained damage to its bottom and port side as the result of its movement from Position A to Position B. (89a, par. 13). At 2108 hours, May 8, 1967, 2 days and 23 hours after the vessel had settled into Position B, the BEAUREGARD was refloated. (90a, par. 44).

Sea-Land contended on the trial that the damage sustained by the BEAUREGARD when it moved from Position A to Position B was general average damage because it was caused by the towage operation. On the other hand, Cargo contended that that damage was caused by an unbroken chain of events which began with the grounding itself and, therefore, should be characterized as particular average damage. The Trial Court decided in favor of Cargo. It found that:

> "[i]t is more likely than not that the ship would have shifted roughly to 'Position B', regardless of whether the tow had been attempted;"

a finding which it

> ". . . based on the evidence of wind and current and the testimony of eye witnesses." (85a, par. 8).

The Trial Court further found that:

> "had the tow not been attempted at least the damage actually suffered would have occurred." (86a, par. 9).

In its brief, Sea-Land purports to accept findings of fact No. 8 and 9, and disagrees with the Trial Court as to the proper legal test to be applied. (85a, par. 8; 86a, par. 9; Brief for Appellant at 6). In reality, however,

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E-5). Sea-Land argues that the BEAUREGARD could not physically have gone to Position B had the tow not been attempted. (Brief for Appellant at 9). There is no evidence to support this.

Sea-Land quarrels with these findings of fact, as well as the finding that:

> "[i]t was not open to the Master to attempt to hold the ship in 'position A' by using 'full ahead' power and thus driving her further on to the rocks." (Brief for Appellant at 3-13, 21-23; 86a, par. 10).

POINT I

The York-Antwerp Rules 1950 Govern this Case.

By contract, the York-Antwerp Rules 1950 govern the case at bar. Sea-Land's long form bills of lading all contained the following general average clause:

> "General Average shall be adjusted, stated and settled according to York/Antwerp Rules 1950. . . ."

(Pl. Ex. 5 at 3, not contained in the Joint Appendix; 156a-157a).

Starting in the 1860's, the international commerce community became dissatisfied with the law and practice of the adjustment of general average. Uncertainty and lack of international uniformity plagued the shipping world. As a result of common international agreement, the York-Antwerp Rules 1890 were born. The Rules were later revised in 1924, 1950, and again in 1974. L. Buglass, General Average and the York/Antwerp Rules 1950, 7 (1959) (hereinafter Buglass); E. Congdon, General Average—Principles and Practice in the United States of America 53-54 (2d ed. 1952) (hereinafter Congdon); G. Gilmore & C. Black, The Law of Admiralty 252 (2d ed. 1975) (hereinafter Gilmore & Black); 7 British Shipping Laws, The Law of General Average 232, 286-87 (9th ed. 1964) (hereinafter Lowndes & Rudolf).

The Rules were designed to be a complete trade made code. *Oak Hill,* 1970 A.M.C. 227, 234 (Ex. Ct. of Canada, Quebec Admiralty Dist., Montreal Registry Div. 1970); *Makis,* 1928 A.M.C. 1737, 1746 (Kingdom of Great Britain and Ireland, High Court of Justice, K.B. Div. 1928). In America, they have been widely accepted. It is reported that:

> "American commercial interests seem generally to have accepted the 1950 Rules in their entirety, and standard bills of lading issued in this country now stipulate for them without editing." (GILMORE & BLACK 253).

The Rules have no legal effect in and of themselves. But when they are incorporated in the contract of carriage, the authors uniformly state that they become binding on the parties to that contract. BUGLASS 7; CONGDON 54; GILMORE & BLACK 253; LOWNDES & RUDOLF 286.

This Court has applied the York-Antwerp Rules when they have been incorporated in the bill of lading. *St. Paul Fire & Marine Ins. Co.* v. *The Motomar,* 211 F.2d 690, 692, 1954 A.M.C. 870, 872 (2d Cir. 1954); *Societa Anonima Cantiero Olivo* v. *Federal Ins. Co.,* 62 F.2d 769, 772-73, 1933 A.M.C. 323, 329 (2d Cir. 1933), *cert. denied,* 289 U.S. 759, 53 S.Ct. 792, 77 L.Ed. 1503 (1933); *Lange* v. *George D. Emery Co.,* 18 F.2d 744, 745, 1927 A.M.C. 844, 845 (2d Cir. 1927), *cert. denied,* 275 U.S. 540, 48 S.Ct. 36, 72 L.Ed. 414 (1927).

In its brief Sea-Land completely ignores the York-Antwerp Rules 1950, and in their place, proffers for the first time[7] in this case a novel test based upon the dictionary

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[7] If presented to the Trial Court, it would probably have given this desperate and faulty theory the short attention it deserves.

definition of particular average. (Brief for Appellant at 14). Obviously Sea-Land finds more solace in the dictionary than in the Rules, for no where in the Rules does Sea-Land's "avoidable-unavoidable" test appear. Indeed the test is inconsistent with the Rules. (*infra* POINTS II & III). The cases cited by Sea-Land do not mention the test, and research by Cargo uncovers no cases to support it.

It is respectfully suggested that the Court disregard Sea-Land's "avoidable-unavoidable" argument because it is not consistent with the requirements of the Rules.

POINT II

The bottom damage was the direct consequence of the combined East Northeast natural forces—not the tow.

Plaintiff-appellant Sea-Land had the burden to prove to the Trial Court that the bottom damage sustained by the BEAUREGARD in her move from Position A to Position B was the direct consequence of a general average act, i.e. the tow. This proposition is based upon the following York-Antwerp Rules 1950:

> "Rule E. The onus of proof is upon the party claiming in general average to show that the loss or expense claimed is properly allowable as general average."
>
> "Rule C. Only such losses, damages or expenses which are the *direct consequence* of the general average act shall be allowed as general average . . . ." (emphasis added).

The Trial Court's finding of fact No. 8, *infra* precluded its holding that Sea-Land had met its burden to prove that

the bottom damage was the direct consequence of the tow. It held that it was

> "more likely than not that the ship would have shifted roughly to 'position B', regardless of whether the tow had been attempted."

and that

> "had the tow not been attempted at least the damage actually suffered would have occurred." (85a, par. 8; 86a, par. 9).

These findings were

> "based upon the evidence of wind and current and the testimony of eye witnesses." (85a, par. 8).

There is overwhelming evidence in support of the Trial Court's findings of fact.

In evaluating the evidence, one must visualize the vulnerable position of the BEAUREGARD relative to all the natural forces at Rio Haina on May 5, 1967 at 1813 hours and thereafter. The BEAUREGARD was stranded perpendicular to a breakwater with a wrecked tanker on her port bow. (Pl. Ex. 8 at 106, 11. 17-19-Boehm Dep. Not in Appendix). Of course no one knew at that time how far into the breakwater and the adjacent wreck the BEAUREGARD actually was, but a detailed report of Mr. Ganly (E-40, E-41) and a photograph (E-102) made of the bow of the ship in the drydock disclosed the actual extent of the stranding at that time. Mr. Ganly made his examination of the vessel's hull at the request of Sea-Land. The port side plates at the bow were in contact with the tanker up to the six foot water mark. However, the heaviest contact was found at about the three foot water mark on the port side (257a, l. 25-258a, l. 8-Ganly). Inasmuch as

no starboard plates on the bow were found damaged at the time of Ganly's examination (E-40; 277a, ll. 16-20-Reineke), it must be assumed that the vessel was not in the firm grip of the breakwater rubble as Sea-Land reiterates (Brief for Appellant at 2, 8, 28), but only had contact on the port bow (277a, ll. 21-25- Reineke). It should be borne in mind also, that according to Ganly, the vessel was six feet onto the rocks (228a, ll. 12-13-Ganly) on the port side only and that thus 462 feet of her total overall length of 468 feet 8½ inches (Def. Ex. J Not in Appendix) was free and subject to the effect of the prevailing weather and sea conditions.

At that time, the wind was from the ENE at 15 to 25 knots. (E-81-Coast Guard Report; E-8-ship's log[8]). With containers tiered one and two high on deck (E-6, Pl. Ex. 2C), and her head 357° True while in Position A, the ENE wind had an obvious effect of pushing her to port. The sea was rough with four foot waves from the ENE, and 10 to 15 foot swells from the same direction. (E-81-Coast Guard Report). The prevailing current across the mouth of the harbor was from the ENE. (E-64-Boehm; E-92-Boehm). The wind, the waves, the swells, the current—all from the ENE—combined to relentlessly work the BEAUREGARD to port. (328a, l. 17-330a, l. 9; 348a, ll. 23-25-Boehm).

The Trial Court was impressed with the testimony of the on-the-scene master mariners: Captain Boehm; Pilot Torres; and Tug Captain Rojo.

When Captain Boehm was examined concerning what action he had to take at the time of the stranding, and what he was trying to avoid, he said:

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[8] E-8, ship's log entries on wind: 1813 strong ENE squall, 2000 ENE 5, 2200 ENE 5, 2400 ENE 5-4. Numbers 5 and 4 refer to Beaufort wind scale, 5 equals 17-21 knots; 4 equals 11-16 knots. N. Bowditch, H.O. Pub. No. 9—American Practical Navigator 1059 (1966).

"Q. Captain, I suggest to you that when you sent the RB 13[9] to the starboard quarter of the BEAUREGARD and told it to pull away, you intended that she should and could have pulled the BEAUREGARD off the rocks; that was your intention, wasn't it?

A. Yes, I tried to get the ship out.

Q. And if it was done right, that's what would have happened?

A. Well, you've got to take and consider the weather, weather conditions. We tried our best to get her off.

Q. But the weather conditions you knew about?

A. Yes.

Q. Everybody knew about them?

A. But we couldn't sit there, let the ship drift further inshore. We had to do something. The stern would have swung right around.

Q. Right, if nothing were done, she would have come right around to where she did end up?

A. Yes, that's true. Maybe worse. I didn't know what was in there."[10]

(400a, l. 22-401a, l. 18).

Captain Boehm further testified:

"Q. Now, tell me, knowing what you know about the Dominician Navy tugs, their inefficiency, their in-

---

[9] At the time of Boehm's deposition it was thought that the RB 13 was the first tug to render assistance.

[10] Sea-Land attempts to distinguish the words "inshore" and "ashore" from the BEAUREGARD swinging to port. (Brief for Appellant at 22). However, it is clear from Captain Boehm's testimony that he equated the two terms with movement to port since in his testimony he acknowledges that she would have come right around to where she did end up in Position B.

experience, their old tugs, why didn't you just use them to hold the Beauregard steady until the Puerto Rico tugs could come along?

A. Because I was afraid the ship was going to go further ashore.

Q. Even using tugs to hold it?

A. Yes.

Q. With the anchor and the tugs and the line to the breakwater?

A. Well, the, the anchor wasn't doing too much good then. There was only a short lead on it and it was leading aft."

(395a, l. 15-396a, l. 4).

Pilot Torres testified:

"Q. What would have happened to the ship if you hadn't attempted to remove her with the tugboat?

A. In any way the ship was going to hit against the rocks."

* * *

"Q. If the tug that was employed were not employed would the ship have remained where it was or would it have moved to the west?

A. Yes, the ship would go to the west if they had not used the tugboat."

(417a, ll. 17-20; 443a, l. 18-l. 2).

Captain Rojo testified:

"Q. In your opinion had you not made an attempt to pull the vessel off the rocks would it have gone westerly to this position that it eventually found itself in, anyway?

A. Yes, the ship was going to that position because of the wind and the heavy seas, anyway."

(450a, ll. 8-20).

Another eye witness, Sea-Land's Manager Collie also foresaw that the imminent danger to the vessel at Position A was the sideward movement to port. On May 26, 1967 he reported to his superior in Elizabeth, New Jersey. (E-100).

> "In the first instance, because of the urgency in floating the Beauregard *before she further beached herself,* the Dominican Navy was asked by the undersigned on the evening of May 5th to cooperate to its fullest extent." (emphasis added).

Even Mr. Mello, Sea-Land's Manager for the Carribean area testified:

> "Q. Assuming that the drawing I have just referred to was prepared to show how the Beauregard moved between the time of its initial stranding and the time the line parted what would account for the ship moving both with respect to its heading and with respect to the position between the time the line parted, do you understand my question, Captain?
>
> A. Yes, sir. Your question is what caused it to move from Position A to Position B let us say.
>
> Q. Yes.
>
> A. Most likely wind and weather I would say."
>
> * * *
>
> "Q. *Couldn't the fact that she was partly removed from the strand have caused her to shift to second position?*
>
> A. *No,* because she was at 2015, two hours after the line parted she was still aground on the bow only so they had shifted." (Emphasis added).
>
> * * *

"Q. *So any change as reflected in the log book between the position on the 5th of May and the position on the 6th of May has to do with the element on the wind and sea, et cetera?*

A. *To the best of my recollection, yes.*" (Emphasis added).

(292a, ll. 2-12, ll. 18-23, l. 25; 293a, ll. 2-5-Mello Dep. read in).

Of course, Mello was not an eye witness to the stranding and the ship's movement to port. His testimony is important though because it corroborates the testimony of Boehm and others that natural forces caused the vessel to go to port. None of the eye witnesses to the vessel's shift from Position A to B attributed it to the tug or to the breaking of the towline.

The only contrary position found in the trial record was taken by Sea-Land's expert, Mr. Ganly. He was not an eye witness to the stranding or the salvage attempts, but he subsequently examined the ship's bottom in the drydock in New Jersey. He did not consider the testimony of either Captain Mello or Pilot Torres. (248a, ll. 7-9).

He wrote to Mr. Myerson and concluded:

". . . had the vessel not tried to refloat when and as she did, she would have remained firmly fixed by the bow and would have suffered no further damage." (E-107).

Ganly's opinion prompted Myerson to classify the bottom damage as general average damage. (165a, l. 13-166a, l. 7).

On cross-examination, Ganly testified:

"Q. If the Beauregard, if nothing were done to her in Position A would it have been likely to still go further on the rocks to port, that is her stern to port

and would your conclusion have changed that it was general average?" (240a, ll. 24-3).

* * *

"A. . . . of course she would. . . ." (240a, l. 19).

* * *

"Q. . . . I ask you to assume nothing was done.

A. I will assume nothing was done and she just lays there. She will eventually go to port. She has to because that is the prevailing wind and weather. . . ." (241a, ll. 2-6).

As a result of this change of Ganly's position, Myerson, the general average adjuster, testified that if Ganly had told him that the ship would probably have moved to port, he "might have given a different conclusion" (281a, l. 22); he "would have made a different segregation." (282a, l. 6).

He testified:

"Q. If he just told you that it would probably have moved where would the intentional sacrifice have been?

A. There wouldn't have been any. But that isn't what he said to me." (282a, l. 24-283a, l. 3).

It is evident that had Meyerson had the benefit of the Trial Court's finding of facts No. 8 and 9 in preparing his adjustment, he would have classified the bottom damage as particular average.

Implicit in Sea-Land's repetitious reminders, that the success of the salvage effort would have avoided the bottom damage, is that the failure of that operation allowed and therefore caused the bottom damage. The following analogies are illustrative of Rule C's "direct consequence" requirement:

A vessel at sea is imperilled by fire. The only available means to extinguish it is a fire boat which the

> master summons alongside. A fire hose is run from the fire boat to the vessel. Some progress is made in extinguishing the fire but suddenly the hose parts in surging seas and the fire continues to burn. Additional help is summoned but by the time the fire is put out extensive fire damage has occurred.

In such a situation, was the extensive fire damage the direct consequence of the hiring of the fire boat and the parting of the hose, or was it the direct consequence of the fire itself? The answer is obvious. The fire caused the damage independently of the fire boat and the parting of the hose. The fire was the peril. Neither the fire boat nor the breaking of the hose created an additional risk of fire, even though had the hose not parted the fire may well have been extinguished with a resulting saving to the venture.

A non-general average analogy, but one also on point is offered:

> A is being swept down the Niagara River at a point ½ mile from the Falls. B throws him a line which temporarily stays his movement. The line parts and A continues down river and goes to his death over the Falls.

In this situation, was A's death the direct consequence of the throwing of the line and its breaking? The answer is also obvious. A's perilous position caused his death, even though he might have been saved had the rope not broken.

In this appeal, as in the analogies, intentional activity was implemented to overcome the effect of a peril, which was brought about and was continued by natural forces. In each instance something went wrong and the act failed to overcome the natural forces. It was the continuing perils born of natural forces, rather than the intentional

acts and their foreseeable consequences, which brought about the losses that the acts sought to avoid.

Sea-Land's argument that a foreseeable consequence of the general average act, *i.e.*, the parting of the towline, caused the bottom damage is a tacit acknowledgment of the "direct consequence" requirement of Rule C.

The Trial Court found that at least that damage would have occurred. (86a, par. 9). Captain Boehm acknowledged this fact also:

> "A. But we couldn't sit there, let the ship drift further inshore. We had to do something. The stern would have swung around.
> Q. Right, if nothing were done, she would have come right around to where she did end up?
> A. Yes, that's true. Maybe worse. I didn't know what was in there." (401a, ll. 12-18).

Boehm hired the tug to prevent the vessel's movement to port. His intention in doing so was to avoid whatever contingency awaited her in the shift to Position B. We now know that it was bottom damage. He intended to avoid the bottom damage. To suggest, as does Sea-Land, that Boehm at the same time intended to damage the Beauregard's bottom is absurd.

At this juncture a discussion of two cases cited by Sea-Land would prove useful. They are *Australian Coastal Shipping Commission* v. *Green,* [1971] 1 Lloyd's Rep. 16 (C. A. 1970) and *Anglo-Grecian Steam Trading Co. Ltd.* v. *T. Beyson & Co.,* [1926] 24 Lloyd's List L.R. 122 (K.B. 1926).

Australian involved two separate incidents. The court in each instance found that a vessel was in peril. A tug was hired to save it and this was a general average act.

Each salvage contract contained a provision which indemnified the tug for damage arising in the salvage operation. In each case a towline parted and fouled the tug's propeller which, in turn, caused damage to the tugs. The issue before the court was whether the indemnifications, as provided for in the towage contracts, that is, the money paid to the tug owner by the ship owner in one instance and the costs incurred in successfully defending the tug owner's claim in the second instance, were general average expenditures. The court concluded that they were after determining that the parting of a towline was a foreseeable consequence of the general average act of engagement, and that the damage to the tugs and the need to indemnify occurred as a direct consequence thereof. The issue before the court was one of causation, which related back in an unbroken chain to the general average act, that is, the time when the tugs became wedded to the event. Indeed, if the British Court had applied its causation test to the facts in this case, it undoubtedly would have concluded that the unbroken chain of causation insofar as bottom damage to the Beauregard was concerned *began with the peril itself,* rather than with any general average act.

In *Anglo-Grecian,* a vessel was made helpless by a buoy which fouled her propeller. A decision was made to beach the vessel in a safe area so that the buoy could be removed. While under tow for that purpose the vessel unexpectedly grounded east of the intended stranding point. Tugs were hired to extricate the vessel, but the hawsers parted. In a rising tide the ship was forced on rocks and sustained bottom damage. The issue in the case was whether the bottom damage was general average damage. The court held that it was because that damage was the end result of an unbroken chain of events which began with the general average election to beach the vessel.

Cargo acknowledges that the foreseeable consequence of a general average act may qualify as a general average sacrifice or expenditure if that consequence evolved in an unbroken chain of events from the general average act. However, the bottom damage to the BEAUREGARD in this case did not have its origin in an unbroken chain of events which began with the general average election to tow her from Position A. From the moment she beached herself she was in imminent danger of going to port—to Position B. The ENE forces which placed her in peril at Position A, continued to threaten her; they made the rescue operation hazardous and caused the towline to part; they worked the vessel over to port to her final resting place, Position B. Neither the appearance of the tug, nor the tow attempt, nor the parting of the line, interrupted the chain of events which began with the grounding at Position A as the result of natural forces.

Sea-Land refers to *Reliance Marine Ins. Co.* v. *New York and C. Mail S.S. Co.*, 77 Fed. 317 (2d Cir. 1896) as controlling. That case concerned particular and general average damage caused respectively by smoke, initially from a fire itself and thereafter from efforts used to put out the fire. It would be relevant to this case only if the Trial Court found that some of the bottom damage to the BEAUREGARD was the "direct consequence" of the tow operation and its foreseeable consequences. In such a case, unless the particular and general average can be separately calculated no claim for general average damage will lie. The Trial Court rejected the argument that the breaking of the towline caused the bottom damage. (86a, par. 9). Unless this Court finds that holding to be clearly erroneous there is no general average damage to segregate from the particular average damage.

Starlight Trading v. *S.S. San Francisco Maru*, 1974 A.M.C. 1523 (S.D.N.Y. 1974) (not officially reported) is

cited with approval by Sea-Land. (Brief for Appellant at 18, 19, 20). That case supports Cargo's position on this appeal. In *Starlight,* plaintiff's cargoes were damaged by smoke, damage which probably would have been avoided if it were not for the general average act of closing down the hatches. The damage was held to be general average damage because it was caused by the general average act. Similarly, if the parting of the towline, rather than the peril itself caused the bottom damage to the BEAUREGARD, that damage would be general average damage. The Trial Court found no such causation, and unless this Court finds its holding clearly erroneous there is no general average damage.

Sea-Land wishes to distinguish *The Major William H. Tantum,* 49 Fed. 252 (2d Cir. 1891) because the BEAUREGARD ". . . could have avoided the swing to port . . . [i]f the tow line had not parted. . . ." (Brief for Appellant at 17, 18). The eyewitnesses to a man all believed she would have gone to port anyway. (*supra* at 11-13). It is suggested that the Trial Court's "more likely than not" finding is not predicated upon a reluctance to adopt these opinions, but rather, is an acknowledgment that the BEAUREGARD conceivably could have broken up or been holed and sunk at any time before she arrived at Position B. The slipping of the anchor in the *Tantum* case no more caused the vessel to beach herself than the salvage attempt and the breaking of the towline caused the BEAUREGARD to move to Position B in this case. The damage to the Tantum was no more general average than the damage to the BEAUREGARD. Sea-Land's effort to recover in general average for the bottom damage should be viewed as another ". . . audacious attempt to foist onto the cargo owner expenses which legitimately should be borne by the vessel owner alone." *Gemini Navigation, Inc.* v. *Phillip Brothers Division of Mineral & Chemicals,* 499 F.2d 745, 746 (2d Cir. 1974).

POINT III

Sea-Land has not sustained its burden to prove that the bottom damage was an extraordinary and intentional sacrifice.

The hull damage found by Ganly is consistent with the vessel's movement to port from Position A to Position B. (E-108). York-Antwerp Rule A provides:

> "Rule A. There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure."

It is difficult to conceive how Sea-Land can satisfy its Rule E burden of proof to show a sacrifice of the BEAUREGARD'S bottom if the vessel "more probably than not" would have shifted from Position A to Position B regardless of whether the tow attempt was made. (85a, par. 8). The Trial Court concluded that "at least the damage actually suffered would have occurred." (86a, par. 9). Neither of the Trial Court's findings in this regard have been challenged as erroneous. Sea-Land appears to be arguing that unless cargo can prove that the bottom damage was a certainty, its claim for general average will lie. It is submitted that this view is contrary to Rule E which places the burden of proof squarely upon the party seeking contribution. (*supra* at 8). The Rule in effect requires that Sea-Land prove that the vessel would not have sustained bottom damage except for the general average act. Sea-Land has not met this burden.

Sea-Land also urges that the Trial Court's determination would effectively eliminate general average because if

the danger necessarily imperils the entire venture nothing can ever be found to be sacrified. (Brief for Appellant at 15, 16). This argument begs the question not only of "sacrifice", but also of "direct consequence" as they relate to the facts in this case. (*supra* Point II).

Sea-Land's "valley" hypothetical proves helpful to illustrate Cargo's argument. (Brief for Appellant at 16). Let us consider that the water behind the dam represents the natural forces which grounded the BEAUREGARD and continued to threaten her. The narrow area of the valley is the bottom of the BEAUREGARD. For purposes of Rule C, the "direct consequence" of the opening up of the sluiceway was damage to this area. Query. How much contribution, if any, should the owner of the narrow area receive in general average? Buglass says that in the case of bottom damage, only "additional damage" is recoverable. BUGLASS, MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES 136 (1973). If we assume for the purposes of argument that "additional damage" did occur, Sea-Land, in order to recover would have to prove how much additional damage occurred. *Reliance Marine Ins. Co.* v. *New York and C. Mail S.S. Co.*. 77 Fed. 317, 319-20 (2d Cir. 1896).

The valley analogy, though helpful to cargo, does not in all respects coincide with the facts in this case. The Trial Court found that the BEAUREGARD ". . . could have been holed or broken up where she was . . .", while the valley's destruction was a certainty if nothing were done. (Brief for Appellant at 16). The tug did not cause the BEAUREGARD to go to port (*supra* at 11-16), while the opening of the sluiceway caused the damage to the narrow area. (Brief for Appellant at 16). Thus, assuming the valley case gives rise to a recoverable general average, it nevertheless is not dispositive of Sea-Land's claim for general average on this appeal.

POINT IV

Sea-Land's "avoidable-unavoidable" test is totally without merit.

Casting aside any consideration of York-Antwerp Rules 1950, Sea-Land embarks upon an "avoidable-unavoidable" test and after engaging in sophistic and confusing argument blithely concludes that the bottom damage to the SS BEAUREGARD was general average damage.

This test is purportedly premised upon Oxford English Dictionary, p. 143 (Compact Edition 1971) definitions:

> "*Particular Average* is the incidence of the partial loss or damage of ship, cargo, or freight, through *unavoidable accident,* upon the individual owners (or insurers) of these respective interests.
>
> *General Average* is apportionment of loss caused by *intentional* damage to ship, e.g. cutting away of mast or boats, or sacrifice of cargo and consequent loss of freight, or of expense incurred by putting into a port in distress, by acceptance of towage or other services, to secure the general safety of ship and cargo; in which case contribution is made by the owners (or insurers) of ship, cargo, and freight in proportion to the value of their respective interests (emphasis in original)."

(Brief for Appellant at 14).

However, after having offered definitions of both particular and general average, Sea-Land ignores the latter and concentrates on the former. It postulates that whenever *damage* is avoidable, it cannot be particular average; and that such damage must, therefore, be general average damage. It is interesting to note that although Oxford

defines particular average as "damage . . . through unavoidable accident", Sea-Land conveniently elects to thereafter characterize particular average as "unavoidable damage" (Brief for Appellant at 4, 11, 19-20). On this ground alone any argument equating "unavoidable damage" with particular average should be rejected.

With a fabricated premise as its primary armament, Sea-Land then seeks to prove that the bottom damage was general average damage. Its most repetitious argument is that since the bottom damage would have been avoided if the towline had not parted, the bottom damage was not particular average and therefore general average damage. In deference to the glibness of this proposition, Sea-Land alternatively argues that that damage was avoidable, and therefore, general average damage, because the vessel conceivably could have been holed or broken up at Position A (Brief for Appellant at 15, 27), events which hypothetically could have prevented her movement to Position B, and thus obviated the bottom damage. The difficulty with this argument, bearing in mind the Trial Court's finding that the SS BEAUREGARD "more likely than not" would have swung to Position B in any event, is that it would follow that whenever a peril exposes the venture to different categories of damage, whatever damage occurs is general average damage.

Cargo categorically rejects Oxford's suggestion that particular average damage arises only through "unavoidable accident". For example, if a ship is stranded through the negligence of her crew, the resulting damage to ship and/or cargo is particular average, even though the accident could have been avoided through the exercise of due care. It is doubtful that even Sea-Land, however hard pressed, would argue for general average in such a case.

The fallacy of an "avoidability" test for general average damage is also amply demonstrated by Cargo's fire analogy (*supra* at 15-16), for the additional fire damage which would have been avoided had the fire hose not parted is indisputably particular average damage.

Finally, in the context of this case, Sea-Land's discredited argument actually supports Cargo. The parting of the towline was an unavoidable accident. (89a, par. 11, 12). If the unavoidable accident caused the bottom damage, as Sea-Land contends, then the bottom damage was particular average damage, and accordingly not general average damage.

Sea-Land's discussion of *Reliance Marine Ins. Co.* v. *New York and C. Mail S.S. Co., supra; Starlight Trading* v. *S.S. San Francisco Maru, supra;* and *The Major William H. Tantum, supra;* in the context of its "avoidable-unavoidable" argument is contrived. (Brief for Appellant at 17-20). Cargo has reviewed any relevancy these cases may have on this appeal (*supra* at 19-20), and any further consideration of them is unnecessary.

POINT V

Captain Boehm could not have held the BEAUREGARD in "Position A" by using full ahead with left rudder.

Sea-Land contends that the Trial Court's finding of fact No. 10 is clearly erroneous. (86a; Brief for Appellant at 23).

Finding of Fact No. 10:

> "It was not open to the master to attempt to hold the ship in 'Position A' by using 'full ahead' power and thus driving her further on the rocks." (86a).

Sea-Land further contends that this finding ". . . should be reversed since it is not supported, but rather is rebutted by the evidence." (Brief for Appellant at 23).

Cargo strongly takes issue with Sea-Land's contention, for the Trial Court's finding of fact No. 10 is supported by the evidence as set forth hereinafter.

Mr. Ganly, Sea-Land's expert, was the only witness to testify that "[s]he could have held her position by going full ahead with a left rudder and that would have helped to hold her." (240a, ll. 15-17). He was not an eyewitness at Rio Haina while the BEAUREGARD was grounded. He met the ship at Port Elizabeth, New Jersey, and conducted his survey at the drydock in Hoboken, New Jersey. (217a, l. 20-218a, l. 3).

Mr. Reineke, Cargo's expert, was of the opinion that it would be impossible to predict whether the BEAUREGARD could be safely held at Position A unless it was known:

1. how long her engines could operate before they became inoperable due to sand being taken into the cooling system (270a, l. 22-272a, l. 4);
2. what the present state of the tide was (273a, l. 4; 273a, ll. 15-16);
3. what the contour of the bottom was (278a, ll. 2-23).

Ganly did not have this information. He was clearly not in a position to render a proper opinion.

Reineke's opinion that the engines could become inoperable because of sand is corroborated by the factual—as distinguished from the opinion—testimony of Ganly resulting from his survey at Hoboken:

"Q. Was there any other damage that resulted from this operation? I am talking about internally now.

A. That is what I am thinking of, too. We . . . had sand in all of the salt water systems which resulted from sucking in sand and water while they were working the engines on the beach." (231a, ll. 10-15)

The Trial Court had the opportunity to hear the testimony of both Reineke and Ganly and to observe their demeanor. Its rejection of Ganly's testimony must not be overruled unless it is clearly erroneous. The Trial Court's finding is further butressed by Captain Boehm. He testified by deposition concerning his fear that he could not hold the BEAUREGARD in Position A using the anchor, tugs, and a line to the breakwater:

"Q. Now, tell me, knowing what you know about the Dominican Navy tugs, their inefficiency, their inexperience, their old tugs, why didn't you just use them to hold the Beauregard steady until the Puerto Rico tugs could come along?

A. Because I was afraid the ship was going to go further ashore.

Q. Even using tugs to hold it?

A. Yes.

Q. With the anchor and the tugs and the line to the breakwater?

A. Well, the, the anchor wasn't doing too much good then. There was only a short lead on it and it was leading aft." (395a, l. 15-396a, l. 4).

The Trial Court's summary rejection of Ganly's afterthought should not be disturbed on this appeal. (86a, par. 10).

POINT VI

Captain Boehm acted reasonably in attempting the tow.

In Point II of its Brief, Sea-Land cites eight cases for the undisputed proposition that when a vessel is in peril, a Court should defer to the reasonable actions of the master and not apply a test fortified by hindsight. (Brief for Appellant at 32-34).

Cargo agrees that Captain Boehm acted reasonably in hiring the RP 12 to assist the BEAUREGARD at Position A. Cargo did not question the reasonableness of Boehm's actions in the Trial Court. Sea-Land had no choice but to contend that its Master's acts were reasonable, or it would be denied general average because Rule A of the York-Antwerp Rules 1950 defines a general average act as one "reasonably made". The Trial Court found that Captain Boehm acted reasonably. (86a, par. 11). Cargo does not quarrel with this finding.

Cargo also fully agrees with Sea-Land that it is inappropriate to judge the propriety of a master's act using hindsight. Ironically, the only evidence in this case suggesting that Boehm had a more viable option open to him at Position A was Sea-Land's witness Ganly who, on April 25th, 1969 and again on May 9th, 1969, wrote to Meyerson:

> "I think these two observations show that had the vessel not tried to refloat when and as she did she would have remained firmly fixed by the bow and would have suffered no further damage." (E-104; E-107).

Point II of Sea-Land's Brief is extraneous argument totally unrelated to the issues on this appeal. Cargo re-

spectfully suggests that this Court disregard it. (Brief for Appellant at 32-36).[11]

CONCLUSION

The judgment entered herein should be affirmed with costs to Appellees.

Respectfully submitted,

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[11] Sea-Land also sets out alternatives other than the attempted tow and the full ahead with left rudder theory. (Brief for Appellant at 9-10). None of these factual arguments were offered at trial, nor was any evidence offered to support them. Accordingly, they should be disregarded.

SERVICE OF THREE (3) COPIES OF THE WITHIN

Brief IS HEREBY ADMITTED

THIS 31 DAY OF August 1976

Haight, Gardner, Poor & Havens

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